No. 94203-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN DOE G, JOHN DOE I, JOHN DOE J, and JOHN DOE K,
as individuals and on behalf of others similarly situated,

Respondents,

v.

DEPARTMENT OF CORRECTIONS,

Petitioner,

and

DONNA ZINK,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENTS

Prachi V. Dave, WSBA #50498
ACLU OF WASHINGTON
901 Fifth Avenue, Suite 630
Seattle, WA 98164-2086
pdave@aclu-wa.org

Benjamin Gould, WSBA #44093
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
bgould@kellerrohrback.com

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INTRODUCTION AND SUMMARY

Recognizing that patients' health care information is sensitive, the Uniform Health Care Information Act (UHCIA) prohibits its disclosure except in narrow circumstances. *See, e.g.*, RCW 70.02.020. Within the general category of health care information, the UHCIA recognizes that information related to mental health is of utmost sensitivity. It therefore provides additional protections for information that has been compiled in the course of providing mental health services. RCW 70.02.230(1).

These protections from disclosure, the Public Records Act (PRA) affirms, do not go away as soon as health care information comes into a government agency's possession. The PRA affirms this by expressly providing that the UHCIA "applies to public inspection and copying of health care information of patients." RCW 42.56.360(2). This case turns on the PRA's protections for health care information.

Here, Petitioner Donna Zink, citing the PRA, asked the Department of Corrections (DOC) for all SSOSA evaluations in its possession since 1990. CP 116. These evaluations are generated by licensed health professionals when they examine an offender under the Special Sex Offender Sentencing Alternative (SSOSA). To complete the evaluation, the health professional must examine the offender's psychosexual condition and history, assess the offender's risk factors,

summarize diagnostic impressions, and determine whether the offender is amenable to treatment. RCW 9.94A.670(3)(a)–(b); WAC 246-930-230(2)(d)–(f). If the professional deems the offender amenable to treatment, the evaluation must also include a detailed treatment plan. RCW 9.94A.670(3)(b); WAC 246-930-230(2)(g).

The language and structure of the UHCIA and PRA prohibit the production of unredacted SSOSA evaluations. Because SSOSA evaluations easily qualify as the health care information of patients, government agencies must keep them confidential. *See infra* pp. 4–6. In arguing otherwise, Petitioners nullify a provision of the PRA, *see infra* pp. 7–10, and read exceptions into the UHCIA's protections that have no basis in its text, *see infra* pp. 10–11, 18–19. They also ignore the additional protections that the UHCIA gives to information compiled in the course of providing mental health services—a category of information that includes SSOSA evaluations. *See infra* pp. 12–17.

Petitioner Zink, in addition, argues that the trial court should not have allowed Plaintiffs to use pseudonyms. Pseudonymity, however, does not amount to sealing court documents under the General Rules or closing the court to the public and press under article I, section 10 of the Washington Constitution. If anything, pseudonymity in cases like this one promotes public scrutiny by not preventing litigation before it even begins.

STATEMENT OF THE ISSUES

(1) Are unredacted SSOSA evaluations in the Department of Corrections' custody exempt from production under the Public Records Act?

(2) Was the trial court within its discretion to allow Plaintiffs to use pseudonyms?

STATEMENT OF THE CASE

This case's underlying facts and procedural history are described in Plaintiffs' brief to the Court of Appeals, Corr. Br. Resp. 4–8, and in the Court of Appeals' opinion, *Doe v. Dep't of Corr.*, 197 Wn. App. 609, 614–18, 391 P.3d 496 (2017).

ARGUMENT

I. SSOSA evaluations contain information that is exempt from production under the Public Records Act.

Two of the PRA's exemptions from production are relevant here. The first exemption provides that "[c]hapter 70.02 RCW"—also known as the Uniform Health Care Information Act, or UHCIA—"applies to public inspection and copying of health care information of patients." RCW 42.56.360(2). The second exemption forbids production if records fall within "[an]other statute" outside the PRA "which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1).

As it comes to this Court, this appeal asks only whether the evaluations *contain* exempt information. As the Court of Appeals noted,

no party had raised the possibility of redaction, so the question presented was simply whether *unredacted* evaluations were exempt from production. *Doe*, 197 Wn. App. at 623. Petitioners both asked this Court to review the Court of Appeals' refusal to order redactions *sua sponte*, but this Court declined those requests. *See* DOC Pet. 15–19; Zink Pet. 7–9.

As Plaintiffs will explain, SSOSA evaluations do contain information exempt from production under the PRA. The PRA and UHCIA mandate this result in several independently sufficient ways.[1]

A. SSOSA evaluations contain the "health care information of patients," and thus contain exempt information.

The PRA exempts the "health care information of patients," as defined in chapter 70.02 RCW, from production. RCW 42.56.360(2). SSOSA evaluations contain this exempted information.

1. SSOSA evaluations contain "health care information."

Under the UHCIA, "health care information" includes information that (1) "directly relates" to "any care, service, or procedure provided by a health care provider" (2) "[t]o diagnose, treat, or maintain a patient's

[1] As Plaintiffs have noted, the version of the UHCIA that applies here was enacted by Laws of 2014, ch. 220. *See* Pet. Ans. 3 n.1. The UHCIA was amended thereafter by Laws of 2014, ch. 225, but the relevant sections of that second enactment became effective on April 1, 2016, long after Zink issued her request for records. *See Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 375 n.2, 374 P.3d 63 (2016) (applying law at time of request). The second enactment does not provide for retroactive application, so it cannot be applied to a request issued before its effective date. *See In re Estate of Burns*, 131 Wn.2d 104, 928 P.2d 1094 (1997) (interpreting medical-reimbursement statute not to apply to medical benefits granted before the statute's effective date).

physical or mental condition," and (3) that "identifies or can readily be associated with the identity of a patient." RCW 70.02.010(14), (16); Pet. Ans. 3. Under this definition, SSOSA evaluations—the written evaluations that result from the SSOSA examination of an offender—are health care information.

First, SSOSA examinations are provided by health care providers. The SSOSA examination must be provided by specially licensed health professionals. RCW 9.94A.820(1); WAC 246-930-020, 246-930-320; CP 389, ¶ 12. The written SSOSA evaluation is the product of, and so directly relates to, that examination.

Second, SSOSA examinations, and the evaluations that result from them, diagnose and treat an offender's mental condition. In fact, their whole purpose is "to determine whether the offender is amenable to treatment"—i.e., to diagnose whether the offender's mental condition is amenable to health care. RCW 9.94A.670(3). Thus, among the "conclusions and recommendations" that must be included in a SSOSA evaluation are assessments of the offender's mental condition—including "the evaluator's diagnostic impressions," and a "specific assessment of relative risk factors." WAC 246-930-320(2)(f)(ii), (iii). In addition, SSOSA evaluations are intended to treat the offender. Because the evaluations must include a "proposed treatment plan," RCW

9.94A.670(3)(b), evaluations are themselves a necessary part of treatment. Treatment cannot occur without a treatment plan.

Third, SSOSA evaluations identify offenders by name. *See, e.g.*, CP 416, ¶ 4(b).

2. An offender receiving a SSOSA evaluation is a "patient."

The remaining question is whether the offenders are "patients." RCW 42.56.360(2). A "patient" is simply anyone "who receives or has received health care." RCW 70.02.010(31). As has been seen, the act of evaluating an offender under the SSOSA statute qualifies as "health care." The evaluated offender thus qualifies as a patient.

The record also proves that offenders are "patients" where SSOSA evaluations are concerned. The Washington Association for the Treatment of Sexual Abusers, through its leadership, testified that a SSOSA evaluation is no different from any other clinical evaluation by a mental health care provider. An evaluator's "clinical approach" to a SSOSA evaluation "is the same as the clinical approach of an evaluator conducting an intake for a non-criminal justice involved person seeking mental health treatment for a sexual behavior problem." CP 387–88, ¶ 9. Two certified sex offender treatment providers reinforced this conclusion, testifying that they treat SSOSA evaluations just as they do other patients' health care information, which they keep confidential. CP 410, ¶ 6; CP 416, ¶ 4(c).

B. The PRA makes the "health care information of patients" confidential, no matter whose hands it is in.

In seeking review, Petitioners raised a new argument.[2] DOC Pet. 10–11; Zink Pet. 11–13. They now assert that even if SSOSA evaluations are the "health care information of patients" under chapter 70.02 RCW, they are not exempt from production under the PRA. According to Petitioners, when the PRA states that "[c]hapter 70.02 RCW applies to public inspection and copying of health care information of patients," RCW 42.56.360(2), it does not exempt the health care information of patients. Instead, they say, this provision is merely coextensive with the independent confidentiality requirements in chapter 70.02 RCW. And since those requirements forbid only health care providers from disclosing health care information, *see* RCW 70.02.020, a state agency that is *not* a health care provider can release patients' health care information.

Petitioners strip RCW 42.56.360(2) of all meaning. A different provision of the PRA separately exempts public records from disclosure when an "other statute . . . exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). Because RCW 70.02.020 is an "other statute" of precisely this kind, the PRA *already* incorporates the confidentiality requirements of RCW 70.02.020. Under Petitioners'

[2] This Court is not required to consider this argument. *See* RAP 2.5(a). If the Court *does* consider it, though, fairness also requires considering Plaintiffs' counterarguments.

reading, however, RCW 42.56.360(2) does precisely the same thing. It simply duplicates the PRA's "other statute" exemption.

This reading defies basic interpretive principles by rendering RCW 42.56.360(2) utterly superfluous. "[I]t is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of the statute." *In re Dependency of K.D.S.*, 176 Wn.2d 644, 656, 294 P.3d 695 (2013) (citation and quotation marks omitted).[3] While exemptions to the PRA are to be construed narrowly, RCW 42.56.030, the Court has never taken that directive as license to *erase* an exemption. That, however, is just what Petitioners are asking this Court to do here.

The PRA's enactment history also stands in the way of Petitioners' attempt to nullify RCW 42.56.360(2). The PRA's "other statute" exemption was enacted in 1987. Laws of 1987, ch. 403, § 3. Four years later, in 1991, the legislature enacted what is now RCW 42.56.360(2) when it passed the first version of the UHCIA. Laws of 1991, ch. 335, § 902. If RCW 42.56.360(2) were merely coextensive with the confidentiality provisions included in the UHCIA, there would have been no need to enact it, since the "other statute" exemption already

[3] *See also, e.g., Cornu-Labat v. Hosp. Dist. No. 2 Grant Cty.*, 177 Wn.2d 221, 231, 298 P.3d 741 (2013) (following this principle when interpreting a PRA exemption).

incorporated those confidentiality provisions. The legislature does not pass laws for no reason. "[A] change in legislative intent is presumed when a material change is made in a statute." *Darkenwald v. State*, 183 Wn.2d 237, 252, 350 P.3d 647 (2015) (quotation marks and citation omitted).

It is far more sensible, therefore, to interpret RCW 42.56.360(2) to exempt the health care information of patients from production no matter whose hands it is in. This interpretation is consistent with the statutory text. RCW 42.56.360(2) states that the confidentiality protections of chapter RCW 70.02 "appl[y] to public inspection and copying of health care information of patients," without putting any more conditions on that confidentiality. RCW 42.56.360(2) should thus be interpreted to apply those confidentiality protections to public records, on the sole condition that the records are the "health care information of patients."

This interpretation finds additional support in precedent and legislative purpose. *Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 115 P.3d 316 (2005), "discussed only two requirements" for RCW 42.56.360(2) to apply to records: the records must identify a patient and must contain information about the patient's health care. *Doe v. Thurston Cty.*, — Wn. App. —, — P.3d —, 2017 WL 2645043, at *7 (June 20, 2017). *Prison Legal News* thus suggests that "what matters . . . is not the information's *holder*, but the information's *nature*." *Id.* That

conclusion follows also from the UHCIA's purpose. *See Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 435, 327 P.3d 600 (2013) ("[O]ur interpretation of the scope of a given categorical exemption often will depend at least in part on its apparent purposes."). Under the UHCIA, the state's "public policy" is that "a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers." RCW 70.02.005(4). This policy would be nullified if health care information could be publicly disclosed as soon as it left a provider's hands.

C. Even if the PRA exempted the health care information of patients only when health care providers hold it, the DOC, as a health care provider, would have to keep unredacted SSOSA evaluations confidential.

Even if the PRA exempted the health care information of patients only when held by health care providers, Petitioners would still be wrong to argue that the DOC may produce unredacted SSOSA evaluations. For the DOC *is* a health care provider. It is "a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business." RCW 70.02.010(18); *see also* RCW 70.02.010(33) (defining "person"). State law explicitly authorizes the DOC to provide health care to inmates in the ordinary course of its business of providing correctional services. *See, e.g.*,

RCW 72.10.005, 72.10.020; WAC 137-91-010, 137-91-080; *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 639, 244 P.3d 924 (2010).

Zink maintains, however, that a health care provider need not keep a patient's health care information confidential unless the patient is the provider's *own* patient. Zink Pet. 12, 16. Not so. The UHCIA says that the "health care provider . . . may not disclose health care information about ***a*** patient to any other person without the patient's written authorization." RCW 70.02.020(1) (emphasis added). The statute does not say that the relevant "patient" must be the health care provider's *own* patient.[4] Rather, it uses the indefinite article—"a"—to refer to the patient whose health care information a provider may not disclose. This term broadens the statute to refer to any patient, not just a patient of the provider. *See State v. Sweat*, 180 Wn.2d 156, 161–62, 322 P.3d 1213 (2014); Pet. Ans. 9–10. When the legislature wanted to pick out a health care provider's *own* patient, it knew how to do so. *See* Pet. Ans. 10 n.4 (citing other statutes). That it chose *not* to do so in RCW 70.02.020(1) confirms that the statute applies to any patient. *See, e.g.*, *State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) ("[W]hen the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings.").

[4] The definition of "patient" is extraordinarily broad. It "means an individual who receives or has received health care." RCW 70.02.010(31). A person can qualify as a "patient" under the UHCIA without receiving health care from a particular provider.

Consider the consequences if the UHCIA required health care providers to keep only their own patients' health care information confidential. If a patient left one health care provider for another, the patient's former provider could release the patient's records indiscriminately. Things would get no better if the provider's "own" patient was defined more broadly, and a provider could not release information if it had been generated while the patient was still seeing the provider. If that were the rule, a patient's current health care provider could release health care information with impunity so long as the patient's former health care provider had generated the information. These results cannot be what the legislature intended. *See also* Pet. Ans. 10–11.

D. Even if the DOC were not a health care provider, it would still have to keep unredacted SSOSA evaluations confidential under the UHCIA, because they are "information or records compiled in the course of providing mental health services."

Even if the PRA exempted patients' health care information only when held by health care providers, and even if DOC were not a health care provider, SSOSA evaluations would still be exempt from production under RCW 70.02.230.[5] RCW 70.02.230 exempts a special kind of health care information from production, no matter who holds it.

[5] Plaintiffs relied on RCW 70.02.230 below, *see* CP 106–07; Corr. Resp. Br. 24–26, but the Court of Appeals did not reach the issue. *Doe*, 197 Wn. App. at 620 n.30.

1. "Information and records compiled, obtained, or maintained in the course of providing mental health services" are exempt from production even if not held by a health care provider.

RCW 70.02.230 makes SSOSA evaluations confidential, no matter who possesses them. RCW 70.02.230's first subsection states that "the fact of admission to a provider for mental health services and all information and records compiled, obtained, or maintained in the course of providing mental health services to either voluntary or involuntary recipients of services at public or private agencies must be confidential." RCW 70.02.230(1). Under the plain language of this subsection, confidentiality turns on the nature of the "information and records" themselves, not on who holds them.

This fact is underscored by RCW 70.02.230's last subsection. That subsection—subsection 6—provides that "except as provided by RCW 4.24.550, any person may bring an action against *an individual* who has willfully released confidential information or records concerning him or her in violation of the provisions of this section." RCW 70.02.230(6)(a) (emphasis added). This language authorizes against actions against "an individual,"[6] not just against a health care provider. Necessarily, then,

[6] The only limit on the universe of possible defendants is "provided by RCW 4.24.550." RCW 70.02.230(6)(a). That statute, however, is irrelevant here. RCW 4.24.550(3) allows law enforcement, in certain circumstances, to disclose "relevant, necessary, and accurate information" about sex offenders. When law enforcement releases such information, RCW 4.24.550(7) generally immunizes them from "civil liability for

RCW 70.02.230 does not bind only health care providers. Indeed, if it bound only health care providers, the subsection authorizing a civil remedy against "an individual" would be unnecessary. After all, a different section of the UHCIA *already* creates a civil remedy against "a health care provider or facility who has not complied with" chapter 70.02 RCW. RCW 70.02.170(1).

2. SSOSA evaluations contain information or records compiled in the course of providing mental health services at a public or private agency.

The plain language of RCW 70.02.230(1) encompasses SSOSA evaluations. When certified sex offender treatment providers evaluate offenders under the SSOSA statute, those offenders become "voluntary . . . recipients of services at public or private agencies."[7] RCW 70.02.230(1). This is self-evident. The only remaining question is whether the process of evaluation itself counts as "providing mental health services," such that a written SSOSA evaluation—which is compiled "in

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damages." Nowhere, however, does RCW 4.24.550 purport to abrogate confidentiality requirements found elsewhere—including the requirements at issue here. To the contrary, it *preserves* those requirements. *See* RCW 4.24.550(9) (section does not imply that information is confidential "*except as may otherwise be provided by law*" (emphasis added)). Nor, for that matter, does it shield public officials from an injunction under the PRA.

[7] The "public or private agencies" here are not limited to "mental health service agencies" as defined in the UHCIA. RCW 70.02.010(28). If the legislature had meant to refer only to the latter, it would have said so. Also, if "public or private agencies" in RCW 70.02.230(1) referred only to "mental health service agencies," the adjectives "public or private" would be surplusage. *See Dependency of K.D.S.*, 176 Wn.2d at 656. "Mental health service agency" is *already* defined to include "a public or private agency." RCW 70.02.010(18).

the course of" that process—qualifies as information "compiled . . . in the course of providing mental health services." *Id.* The UHCIA does not explicitly define "mental health services," but overlapping language in its definition of "health care" indicates that "mental health services" is exactly what common sense suggests: a "service" that is meant "[t]o diagnose, treat, or maintain a patient's . . . mental condition." RCW 70.02.010(14). As Plaintiffs have argued, the examination under the SSOSA statute is a service provided by a health care provider to diagnose and treat a patient's mental condition. *See supra* pp. 4–6. Hence, the written SSOSA evaluation qualifies as information "compiled . . . in the course of providing mental health services."

In addition, the way that RCW 70.02.230 interacts with other provisions shows that it encompasses SSOSA evaluations. RCW 70.02.230(1) contains a number of exceptions to its confidentiality mandate. Several of these exceptions authorize the release, in certain limited circumstances,[8] of "[i]nformation and records related to mental health services." RCW 70.02.240, 70.02.250(1), 70.02.260(1)(a)(ii). Thus, the information and records that RCW 70.02.230 makes confidential must encompass *at least* "information and records related to mental health services." Otherwise, no exception would be needed to release these

[8] No one has argued that these exceptions allow production here.

"information and records" in certain circumstances. *See City of Seattle v. State*, 136 Wn.2d 693, 702, 965 P.2d 619 (1998); Pet. Ans. 15–16.

The term "information and records related to mental health services," in turn, has three elements, all of which are satisfied by SSOSA evaluations. First, the information and records must be "health care information," RCW 70.02.010(21)—as SSOSA evaluations are. *See supra* pp. 4–6. Second, the information and records must "relate[] to" information and records "compiled, obtained, or maintained in the course of providing services by a mental health service agency or mental health professional." *Id.* SSOSA evaluations satisfy this element too. They do not merely relate to, but actually are, records compiled in the course of a mental health professional's provision of services to an offender. *See supra* pp. 14–15. Third, the mental health professional's services must be, or have been, provided to "persons who have received or are receiving services for mental illness." RCW 70.02.010(21). This element is also satisfied because recipients of a SSOSA examination have received a service for mental illness. Unrebutted evidence in the record indicates that SSOSA examinations are themselves services for mental illness, because they are designed to assess mental illness.[9] As noted earlier, a SSOSA

[9] This is true even if some offenders are deemed not to have a mental illness. A diagnostic examination that gauges whether a patient has a mental illness is a service for—i.e., a service meant to treat *or* diagnose—mental illness.

examination employs the same clinical approach that would be applied to anyone reporting a mental disorder that impairs the ability to control sexual behavior. CP 387–88, ¶ 9; *see also* CP 439, ¶ 13 (SSOSA evaluation "examines whether the individual suffers from a sexual deviancy"). In sum, SSOSA evaluations constitute "information and records related to mental health services."[10]

E. The Sentencing Reform Act does not require the release of unredacted SSOSA evaluations.

Zink's petition briefly argued that the Sentencing Reform Act's prosecutorial standards, RCW 9.94A.475–.480, require the production of SSOSA evaluations. Zink Pet. 13–14. The statutes that Zink cites address "sentencing agreements," "plea agreements," and "sentences," RCW 9.94A.475, and "judgment[s] and sentence document[s]," RCW 9.94A.480(1). Zink cites nothing to suggest that SSOSA evaluations are included in any of these documents. More fundamentally, the statutes simply provide that these documents are public records. The question here

[10] The DOC has suggested (DOC Br. 18) that the definition of "information and records related to mental health services" implicitly excludes SSOSA evaluations by expressly including certain types of documents used in legal proceedings but failing to mention SSOSA evaluations. RCW 70.02.010(21). But the general definition is followed by a list of what that definition "includes," *id.*, indicating the list is meant to be illustrative, not exclusive. SSOSA evaluations are not implicitly excluded. *See, e.g.*, *O.S.T. ex rel. G.T. v. Regence BlueShield*, 181 Wn.2d 691, 701, 335 P.3d 416 (2014) (*expressio unius* canon "is subordinate to the primary rule of statutory interpretation, which is to follow legislative intent"); *Nat'l Clothing Co. v. Hartford Cas. Ins. Co.*, 135 Wn. App. 578, 585, 145 P.3d 394 (2006) (*expressio unius* canon did not apply where there was a general definition, followed by a further definition of what the general definition included); *see also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002).

is not whether SSOSA evaluations are public records, but whether they are *exempt from production*. In any event, the statutes Zink cites do not "create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state," so Zink cannot rely on them to require production of SSOSA evaluations. RCW 9.94A.401.

F. Confidential health care information comes within chapter 70.02 RCW's protections even if it is also used in sentencing proceedings.

The DOC has argued that because SSOSA evaluations are used in sentencing, they cannot qualify as mental health care records under the UHCIA, and so cannot be exempt from production under the PRA. This argument lacks a textual basis. The definition of "health care information" does not so much as hint that a record loses its status as health care information as soon as it also has another purpose besides health care. *See* RCW 70.02.010(16); *Doe*, 197 Wn. App. 621–22. Nor does the language of RCW 70.02.230(1) suggest that "information and records compiled . . . in the course of providing mental health services . . . at public or private agencies" can lose that status if they have a secondary purpose. In its only textual argument, the DOC has argued that because health care information must "directly relate" to a patient's health care, a SSOSA evaluation's use in sentencing disqualifies it as health care information. DOC Pet. 13. The DOC gets things backward. A SSOSA evaluation's

direct purpose is to assess the offender's amenability to treatment and propose a treatment—i.e., to diagnose and treat. RCW 9.94A.670(3). It only *indirectly* relates to sentencing, which takes into account not just the SSOSA evaluation, but other considerations too. *See* RCW 9.94.670(4).

Somewhat similarly, Zink has argued that because the persons receiving SSOSA evaluations have committed a crime, the evaluations cannot qualify as confidential health care information. Zink has generally framed this argument in non-legal terms. She has hinted that recognizing SSOSA evaluations as health care information somehow excuses sex offenses or treats them lightly. Zink Br. 7, 9, 37–38; Tr. of Hr'g, Nov. 6, 2015, at 27:5–21. That conclusion does not follow. As Plaintiffs themselves have noted, a mental condition may *explain* an offense without *excusing* it. CP 419, ¶ 5; CP 424, ¶ 4. Recognizing SSOSA evaluations as confidential health care information is not a moral judgment.

II. The trial court was within its discretion to allow Plaintiffs to proceed in pseudonym.

A. Pseudonymous litigation does not implicate GR 15.

According to Zink, pseudonymous litigation itself amounts to "seal[ing] court records" under GR 15. Zink Pet. 20. As Plaintiffs have pointed out, however, *see* Corr. Br. Resp. 48–50, sealing under GR 15(b)(4) means to protect a document or portions of it "from examination by the public or unauthorized court personnel." A court filing is "sealed"

when it is available to the court but not available to the public. Here, however, Plaintiffs' identities were available to neither. Their identities did "not become part of the court's decision making process" and so were not sealed. *Dreiling v. Jain*, 151 Wn.2d 900, 910, 93 P.3d 861 (2004).

B. Pseudonymous litigation does not implicate article I, section 10.

To determine whether article I, section 10 of the Washington Constitution applies to a proceeding, this Court has adopted the two-pronged experience-and-logic test. The experience prong asks "whether the place and process have historically been open to the press and general public," while the logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *State v. S.J.C.*, 183 Wn.2d 408, 417, 430, 352 P.3d 749 (2015) (citation and quotation marks omitted). In applying this test, the Court has been sensitive to context, "tak[ing] care to define the proceeding at issue with precision" and "focus[ing] on the proceeding that actually occurred." *State v. Jones*, 185 Wn.2d 412, 421, 372 P.3d 755 (2016).

1. Pseudonymity has not historically been treated as closure to the press and public.

Pseudonymous litigation has a long history. It was "firmly entrenched in the English common law by the 17th century." Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. Pitt. L. Rev. 883, 889 (1996). At that time, the

common law recognized only certain forms of action. When claims did not fit well into one of these forms, litigants "sidestepped the problem by creating an entirely fictional character, typically named John Doe, to bring or defend suits on their behalf." *Id.* at 889–90 (footnote omitted). These circumstances, of course, differ markedly from those that usually give rise to pseudonymous litigation today. That fact only strengthens Plaintiffs' position, however. It shows that the most traditional common law courts, even *without* a privacy interest, allowed pseudonymity.

In Washington, pseudonymous litigation is a "longstanding and previously uncontroversial practice," as numerous precedents confirm. *Doe*, 197 Wn. App. at 625 & nn.53–54 (listing precedents). None of these precedents hint that the practice implicates article I, section 10. Indeed, a post-*Ishikawa* case suggests that "a privacy interest" is all that is needed to justify pseudonymity. *N. Am. Council on Adoptable Children v. Dep't of Soc. & Heath Servs.*, 108 Wn.2d 433, 440, 739 P.2d 677 (1987). That conclusion makes sense. The mere fact that a plaintiff proceeds under a pseudonym does not prevent the press and public from accessing court documents, or from attending, observing, and reporting on proceedings.

2. In cases like this one, pseudonymity does not interfere with the public's ability to observe and scrutinize litigation.

Public scrutiny plays a vital role in civil litigation. *See Dreiling*,

151 Wn.2d at 903–04. Within the context of cases like this one, however, pseudonymity does not prevent public scrutiny. If anything, it fosters it.

Had Plaintiffs been forced to proceed in their own names, they likely would not have brought this action, because they would have suffered exactly the kind of harm they sought to prevent by bringing suit. *See Doe v. Harris*, 640 F.3d 972, 973 n.1 (9th Cir. 2011) (allowing pseudonymity "because drawing public attention to [the plaintiff's] status as a sex offender is precisely the consequence he seeks to avoid by bringing this suit"); *see also State v. Ward*, 123 Wn.2d 488, 494 n.2, 869 P.2d 1062 (1994) ("Appellant brought this action under a pseudonym, claiming that public disclosure of his true name would effectively deprive him of the relief sought."). Without this suit, there would have been no public scrutiny of the legal and factual issues this case raises. The DOC would have released SSOSA evaluations in violation of the law. And preventing Plaintiffs from accessing the only relief available would have raised serious due process concerns. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 376–77 (1971) (recognizing a due process right of access to the courts when judicial review is necessary to resolve a dispute).

Nor has pseudonymity hindered the public's ability to scrutinize the contested issues in this action. *See Doe*, 197 Wn. App. at 628. Plaintiffs' identities are not relevant to the questions of statutory

interpretation here. Nor did Petitioners challenge Plaintiffs' credibility or their membership in the certified class. Corr. Resp. Br. 53–55.

Finally, there is a practical reason that pseudonymity does not implicate article I, section 10: courts have developed ways of protecting the public's interest in openness without straining to reach the conclusion that pseudonymity amounts to a full-blown sealing or closure. Courts have adopted "a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure."[11] *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008). Even under this test, pseudonymous litigation is the exception, not the rule. *Id.* at 188–89.

CONCLUSION

The Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of July, 2017.

KELLER ROHRBACK L.L.P.

By: *s/ Benjamin Gould*
Benjamin Gould, WSBA #44093

ACLU OF WASHINGTON

By: *s/ Prachi V. Dave*
Prachi V. Dave, WSBA #50498

Attorneys for Respondents

[11] For a discussion of why the trial court did not abuse its discretion in concluding that Plaintiffs met this test, the Court is respectfully directed to Corr. Resp. Br. 50–55.

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on July 21, 2017, I caused a true and correct copy of this document, along with its Appendix, to be served on Donna and Jeff Zink (dzink@centurytel.net) and Timothy John Feulner (TimF1@atg.wa.gov; cherriek@atg.wa.gov; correader@atg.wa.gov) via email, pursuant to RAP 18.5(a) and CR 5(b)(7).

s/ Darla Marshall
Darla Marshall
Seattle, Washington
July 21, 2017

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KELLER ROHRBACK LLP

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